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<b>G.T., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-0858</b>
	)	<b>Issued: December 6, 2021</b>
<b>DEPARTMENT OF AGRICULTURE,</b>	)	
<b>NATURAL RESOURCES CONSERVATION</b>	)	
<b>SERVICE, Washington, DC, Employer</b>	)	
	)	

*Alan J. Shapiro, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

## ORDER REVERSING CASE

Before:

ALEC J. KOROMILAS, Chief Judge  
 JANICE B. ASKIN, Judge  
 PATRICIA H. FITZGERALD, Alternate Judge

On May 19, 2021 appellant, through counsel, filed a timely appeal from an April 12, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> The Clerk of the Appellate Board docketed the appeal as No. 21-0858.

On April 16, 2010 appellant, then a 52-year-old administrative assistant, filed a traumatic injury claim (Form CA-1) alleging on that date she broke her left wrist and injured her back when her desk chair slipped from under her causing her to fall while in the performance of duty. She stopped work on March 19, 2010. On the reverse of the claim form, the employing establishment

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> The Board notes that, following the April 12, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

indicated that appellant was enrolled in the Civil Service Retirement System (CSRS). On May 24, 2010 OWCP accepted appellant's claim for closed fracture of the lower end of the left radius and ulna.

Beginning on May 17, 2010 appellant filed a series of claims for compensation (Form CA-7) for disability from work commencing May 2010. On the reverse side of the claim forms, the employing establishment indicated that she was enrolled in the Federal Employees Retirement System (FERS) retirement plan. In a July 22, 2010 letter, OWCP authorized Federal Employees' Compensation Act<sup>3</sup> (FECA) wage-loss compensation for total disability on the periodic rolls, effective July 4, 2010. Appellant returned to full-time, light-duty work on April 4, 2011 and to full-duty work on July 18, 2011. Appellant stopped work again and, on March 29, 2012 OWCP again authorized FECA wage-loss compensation for total disability on the periodic rolls, effective March 24, 2012.

On December 2, 2020 OWCP issued a preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$61,558.36. It explained that the overpayment occurred because her Social Security Administration (SSA) age-related retirement benefits that she received from February 1, 2012 through October 10, 2020, were partially based on credits earned while working for the Federal Government, and that this portion of her SSA benefit constituted a prohibited dual benefits for which she was not at fault. OWCP requested that she complete an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation to determine a reasonable repayment schedule and advised that she could request waiver of recovery. It further requested that appellant provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, OWCP notified her that within 30 days of the date of the letter, she could request a final decision based on the written record or a prerecoupment hearing.

On December 17, 2020 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review and further requested waiver of the overpayment. The hearing was held on February 17, 2021.

By decision dated April 12, 2021, OWCP's hearing representative found that appellant had received an overpayment of compensation in the amount of \$61,558.36 for the period February 1, 2021 through October 10, 2020 because it had failed to offset her compensation payments by the portion of her SSA age-related retirement benefits that were attributable to federal service. He found appellant without fault in the creation of the overpayment, but denied waiver of recovery because the evidence of record was insufficient to establish that recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience. OWCP's hearing representative further found that there was no evidence that appellant gave up a valuable right or changed in position for the worse such that recovery of the overpayment would be against equity and good conscience. He required recovery of the overpayment by deducting \$675.00 from appellant's continuing compensation payments every 28 days.

The issues on appeal before the Board relate to OWCP's finding of an overpayment of wage-loss compensation benefits due to appellant's alleged concurrent receipt of FECA wage-loss

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

compensation and SSA age-related retirement benefits without an appropriate offset for benefits attributable to FERS.

OWCP's procedures provide that an overpayment occurs when FECA compensation is not reduced by the FERS/FECA offset amount. Since SSA will not report an offset amount until after SSA benefits are received, an overpayment will almost always occur and will need to be calculated for each period in which the offset amount was not withheld from compensation.<sup>4</sup> The offset provision of 5 U.S.C. § 8116(d)(2) and applicable regulations apply to SSA age-related retirement benefits that are attributable to federal service.<sup>5</sup> FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>6</sup> In identifying the fact and amount of an overpayment of compensation following a claimant's receipt of age-related SSA retirement benefits, the Board has observed that OWCP uses a FERS Offset Calculation Worksheet.<sup>7</sup> This calculation worksheet is sent to SSA and the completed form is returned to OWCP setting forth purported SSA calculations as to the effective date and rate of SSA benefits without FERS and the effective date and rate of SSA benefits with FERS.<sup>8</sup> Following receipt of the purported SSA calculations, a preliminary determination of overpayment is issued if a prohibited dual benefit was received.<sup>9</sup>

The Board has observed, however, that not all federal employees are enrolled in FERS. Some FECA claimants are enrolled in another retirement program, such as the CSRS. Other federal employees are not eligible to be enrolled in a federal retirement program. Therefore, OWCP's procedures with regard to requesting offset information are not applicable to all recipients of FECA compensation and SSA age-related retirement benefits. Thus, the information solicited on the FERS Offset Calculation Worksheet that OWCP sends to SSA is not applicable to non-FERS claimants and does not establish either the fact or amount of an overpayment.

Herein, the evidence of record contains conflicting evidence as to which retirement system was applicable to appellant. The Board therefore finds that the April 12, 2021 decision must be reversed.

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1(h) (September 2020).

<sup>5</sup> See 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a).

<sup>6</sup> FECA Bulletin No. 97-09 (February 3, 1997); *C.T.*, Docket No. 21-0153 (issued July 21, 2021).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *C.T.*, *supra* note 6.

**IT IS HEREBY ORDERED THAT** the April 12, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 6, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board